

[PCC-386]

Proportionate Liability Model Provisions

NOTE—

This draft of model provisions relating to proportionate liability has been prepared by the Parliamentary Counsel's Committee for the Standing Council on Law and Justice. The draft has been prepared on behalf of PCC by the ACT office and accordingly ACT drafting style has been used and certain references in the draft are ACT specific. Jurisdictions will need to make appropriate local changes.

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Part 1 Proportionate liability

1 Definitions—pt 1

In this part:

apportionable claim—see section 2.

concurrent wrongdoer, for a claim—see section 4.

court includes a tribunal.

damages includes any form of monetary compensation.

defendant, in a proceeding involving an apportionable claim, includes anyone joined in the proceeding (except as a claimant for the apportionable claim), whether under this part, under rules of court or otherwise.

proceeding means a proceeding in a court.

2 Application—pt 1

- (1) This part applies to apportionable claims.
- (2) A claim is an *apportionable claim* if it is for economic loss or damage to property in—
 - (a) an action for damages (in contract, in tort, under statute or otherwise) where a failure to take reasonable care is an element of the claimant's action; or

Examples—actions that are apportionable claims

- 1 breach of duty of care
- 2 breach of express contractual term to take reasonable care
- 3 breach of implied contractual term to take reasonable care
- 4 breach of director's civil obligation to act with reasonable care and diligence
- 5 breach of statutory warranty to render services with due care and skill
- 6 breach of implied warranty to render services with due care and skill

Examples—actions that are not apportionable claims

- 1 breach of strict contractual duty
- 2 breach of absolute contractual duty

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (b) an action for damages—
- (i) under the Australian Consumer Law (ACT), section 236 (Actions for damages) for a contravention of that Law, section 18 (Misleading or deceptive conduct); or
 - (ii) under the Fair Trading Act, section 46 (Actions for damages) for a contravention of that Act, section 12 (Misleading or deceptive conduct).

Drafting note

Jurisdictions will need to vary the reference to the Australian Consumer Law appropriately.

Jurisdictions will also need to replace par (b) (ii) with reference to the relevant pre-ACL provision for their jurisdiction.

- (3) However, none of the following is an *apportionable claim*:
- (a) a claim arising out of an injury or death;
 - (b) a claim by an individual in an action for damages under the Australian Consumer Law (ACT) other than an action mentioned in subsection (2) (b) (i);
 - (c) a claim by an individual in relation to—
 - (i) goods taken to have been acquired by the individual as a consumer within the meaning of the Australian Consumer Law (ACT), section 3 (1) (a), as limited by that Law, section 3 (2); or
 - (ii) services taken to have been acquired by the individual as a consumer within the meaning of that Law, section 3 (3) (a);

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- (d) a claim to the extent that an Act provides that liability for an amount payable in relation to the claim is joint and several;
- (e) a claim under the *Discrimination Act 1991*;
- (f) a claim to which the *Road Transport (Third-Party Insurance) Act 2008*, chapter 4 (Motor accident claims) applies;
- (g) a claim under the *Workers Compensation Act 1951*.

Drafting note

Jurisdictions may adopt either or both of paragraphs (b) and (c) depending on the extent of consumer carve out sought.

Paragraphs (e) to (g) are ACT specific. Other jurisdictions should replace these with their own specific exclusions, for example—

- claims under the *Transport Accident Act 1986* (Vic), part 3, 6 or 10,
- awards to which the *Motor Accidents Compensation Act 1999* (NSW), ch 5 applies

Jurisdictions may also wish to list other legislation where there are specific statutory schemes for determining liability eg shipping liability.

- (4) For this part, there is a single apportionable claim in a proceeding in relation to the same loss or damage even if the claim for the loss or damage is based on more than 1 cause of action (whether of the same or a different kind).
- (5) In this section:

Fair Trading Act means the *Fair Trading Act 1992* (A1992-72) as in force at any time before 1 January 2011.

injury means personal or bodily injury and includes—

- (a) pre-natal injury; and
- (b) psychological or psychiatric injury; and
- (c) disease; and
- (d) aggravation, acceleration or recurrence of an injury or disease.

3 Non-application to arbitration etc

To remove any doubt, an entity (other than a court) that is able to make a binding determination about liability in relation to an apportionable claim is not required to apply this part in making the determination.

Drafting note

Jurisdictions may choose whether or not to include this provision.

4 Concurrent wrongdoers

- (1) A person is a *concurrent wrongdoer* for a claim if—
 - (a) the person is one of 2 or more people whose acts or omissions (or act or omission) caused, independently of each other or jointly, the loss or damage the subject of the claim or substantially or materially similar loss or damage; and
 - (b) each of them is, or was at any time, legally liable to the claimant for the loss or damage caused.
- (2) For this part, it does not matter that—
 - (a) a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died; or
 - (b) the liability of a concurrent wrongdoer has been extinguished.

Examples—par (b)

- 1 a claim has been settled
- 2 a statutory limitation period has expired

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

5 Intentional or fraudulent wrongdoers not to have benefit of apportionment

- (1) This part does not limit the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in a proceeding involving an apportionable claim if the concurrent wrongdoer intended to cause, or fraudulently caused, the loss or damage the subject of the claim.

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- (2) The liability of an excluded concurrent wrongdoer must be decided in accordance with the legal rules (if any) that, apart from this part, are relevant.
 - (3) The liability of a concurrent wrongdoer who is not an excluded concurrent wrongdoer must be decided in accordance with this part and as if the excluded concurrent wrongdoer were a concurrent wrongdoer for the claim.

6 Proportionate liability for apportionable claims

- (1) In a proceeding involving an apportionable claim—
 - (a) the liability of a defendant who is a concurrent wrongdoer for the claim is limited to an amount reflecting the proportion of the loss or damage claimed that the court considers just and equitable, having regard to the extent of the concurrent wrongdoer's responsibility for the loss or damage; and
 - (b) the court must not give judgment against the concurrent wrongdoer for more than that amount.
- (2) In apportioning responsibility in the proceeding—
 - (a) the court must exclude the proportion of the loss or damage in relation to which the claimant is contributorily negligent under any relevant law; and
 - (b) the court must consider the comparative responsibility of each concurrent wrongdoer who is a party to the proceeding or about whom the claimant has been given information under section 7, including any who have settled with the claimant; and
 - (c) the court may consider the comparative responsibility of any other concurrent wrongdoer, including any who have settled with the claimant.
- (3) If the proceeding involves an apportionable claim and a claim that is not an apportionable claim—

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- (a) liability for the apportionable claim must be decided in accordance with this part; and
 - (b) liability for the other claim must be decided in accordance with the legal rules (if any) that, apart from this part, are relevant.
- (4) This part applies in a proceeding involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceeding.

7 Concurrent wrongdoer to tell claimant etc about other concurrent wrongdoers

- (1) This section applies to a defendant in a proceeding involving an apportionable claim who is, or is alleged to be, a concurrent wrongdoer for the claim.
- (2) The defendant must give the claimant information the defendant has about—
 - (a) the identity of any other person (not already a party to a proceeding involving the claim) who the defendant has reasonable grounds to believe is, or may be, also a concurrent wrongdoer for the claim; and
 - (b) where the person can be located; and
 - (c) the circumstances that make the defendant believe the other person is, or may be, a concurrent wrongdoer for the claim.
- (3) The defendant must give the information to the claimant, in writing, within a reasonable time after becoming a party to the proceeding or becoming aware of the information, whichever is the later.
- (4) If a defendant gives a claimant information about a person under this section, the defendant must give a copy of the information to—
 - (a) the person, if possible; and
 - (b) the court.

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- (5) If it is not possible for the defendant to give a copy of the information to the person, the defendant must take reasonable steps to bring the information to the attention of—
- (a) the person; or
 - (b) if the person is being wound up or has ceased to exist or died— a liquidator or personal representative of the person.

Examples

- 1 seek an order for substituted service
- 2 send the information to someone else the defendant reasonably believes will be able to bring it to the person's attention

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (6) If a defendant fails to comply with this section, a court may, on application, make either or both of the following orders if it considers it just and equitable to do so:
- (a) an order that the defendant is severally liable for any award of damages made;
 - (b) an order that the defendant pay costs thrown away as a result of the failure to comply.
- (7) A defendant is not required to comply with this section in relation to particular information if someone else has already complied with the section in relation to the information.

8 Defendant alleging concurrent wrongdoer

- (1) This section applies to a defendant in a proceeding involving an apportionable claim who alleges that a person is a concurrent wrongdoer for the claim.
- (2) The defendant's pleadings must state the material facts and circumstances that make the person a concurrent wrongdoer.
- (3) The defendant must give a copy of the pleadings to the person, if possible.

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- (4) If it is not possible for the defendant to give a copy of the pleadings to the person, the defendant must take reasonable steps to bring the pleadings to the attention of—
 - (a) the person; or
 - (b) if the person is being wound up or has ceased to exist or died— a liquidator or personal representative of the person.
 - (5) The defendant has the burden of establishing a prima facie case that the person is a concurrent wrongdoer for the claim.

9 Concurrent wrongdoers not required to contribute or indemnify

- (1) This section applies to a concurrent wrongdoer for an apportionable claim—
 - (a) who settles the claim with the claimant; or
 - (b) against whom judgment is given under this part as a concurrent wrongdoer.
- (2) Despite section 21 (Right of contribution), the concurrent wrongdoer cannot be required to—
 - (a) contribute to any damages or contribution recovered or recoverable (at any time) from another concurrent wrongdoer for the claim; or
 - (b) indemnify another concurrent wrongdoer for the claim.

Note However, this part does not affect an agreement to contribute or indemnify (see s 12 (4)).

Drafting note

The phrase ‘Despite section 21 (Right of contribution)’ in cl 8 (2) is ACT specific. Other jurisdictions should insert a similar phrase if the relationship between cl 8 and other statutory contribution provisions needs clarifying.

10 Subsequent proceedings

- (1) This part (or any other law) does not prevent a claimant for an apportionable claim who has been given judgment in a proceeding

against a concurrent wrongdoer for an apportionable part of any loss or damage from bringing a subsequent proceeding against any other concurrent wrongdoer (other than one against whom judgment has already been given) for the loss or damage.

- (2) However, the judgment first given (or that judgment as varied on appeal), other than a consent judgment, determines for any subsequent proceeding—
 - (a) the maximum amount of the claimant’s notional damages; and
 - (b) the minimum proportionate liability of each concurrent wrongdoer who was a party to the first proceeding; and
 - (c) the minimum contributory negligence (if any) of the claimant.
- (3) Leave of the court is required to bring a subsequent proceeding against a person if the claimant had been given information about the person under section 7 and reasonably had the opportunity to include the person as a defendant in a previous proceeding.
- (4) The claimant is not entitled to costs in any subsequent proceeding.
- (5) However, if a court is satisfied that there were reasonable grounds for bringing a separate proceeding, the court may depart from subsection (4) to the extent that it considers it just and equitable to do so.
- (6) In this section:

notional damages, in relation to a claimant, means the amount of the damages (excluding exemplary or punitive damages) the claimant is or would be entitled to assuming—

- (a) no contributory negligence; and
- (b) the defendant were fully liable for the claimant’s loss or damage and were not entitled to limitation of liability under—
 - (i) this part; or
 - (ii) any other law that limits the liability of defendants of a particular class (as distinct from one that imposes a general limitation of liability); or

(iii) a contract.

11 Joining non-party concurrent wrongdoer

- (1) In a proceeding in a court involving an apportionable claim, any number of people may be joined as defendants.
- (2) However, a person may be joined as a defendant only with the court's leave.
- (3) The court must not give leave for a person to be joined as a defendant if the person was a party to a previously concluded proceeding in relation to the claim.

12 Contracting out

- (1) A term of an agreement or contract is void to the extent that—
 - (a) it purports to exclude, limit or modify the operation of this part; or
 - (b) it would (apart from this subsection) have the effect of excluding, limiting or modifying the operation of this part.
- (2) Subsection (1) does not apply if the term was included in an agreement or contract, and the agreement or contract was entered into, before the subsection commenced.
- (3) To remove any doubt, subsection (1) does not affect a term of an agreement or contract to refer all or certain disputes to an entity (other than a court) that is able to make a binding determination about liability in relation to an apportionable claim.

Example—entity

an arbitrator

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (4) This part does not affect an agreement by a concurrent wrongdoer to contribute to the damages recovered or recoverable from, or to indemnify, another concurrent wrongdoer for an apportionable claim.

13 Other liability and protections not affected

- (1) This part does not—
 - (a) prevent a person from being held vicariously liable for a proportion of an apportionable claim for which someone else is liable; or
 - (b) prevent a person from being held jointly and severally liable for the damages awarded against someone else as agent of the person; or
 - (c) prevent a partner from being held jointly and severally liable with another partner for the proportion of an apportionable claim for which the other partner is liable; or
 - (d) prevent a court from awarding exemplary or punitive damages against a defendant in a proceeding.
- (2) A provision of this part that gives protection from civil liability does not limit or otherwise affect any protection from liability given under this Act or any other law.

14 Regulation-making power

The Executive may make regulations for this [Act].

Note A regulation must be notified, and presented to the Legislative Assembly, under the Legislation Act.